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SUPREME COURT, U.S.

No. 80-2078

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

DAMES & MOORE, A PARTNERSHIP, PETITIONER

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA, AND THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D. C. 20530
(202) 633-2217

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MEMORANDUM FOR THE RESPONDENTS

The Solicitor General, on behalf of the United States and the Secretary of the Treasury, urges the Court to grant the petition for a writ of certiorari before judgment to the United States Court of Appeals for the Ninth Circuit in this case.

The district court's decision upholds the authority of the President to revoke licenses for attachments of assets in which Iran has an interest, to order the transfer of these assets in compliance with the terms of the Agreement with Iran, and to suspend claims against Iran that may be presented to the Iran-United States Claims Tribunal. The district court's decision therefore is consistent with holdings of the Courts of Appeals for the First and District of Columbia Circuits, the only two courts of appeals to have ruled on these questions. Although the district court's decision in this case is correct and there is no

conflict among the circuits on the question presented in the petition, we request the court to review these questions under the extraordinary procedure of certiorari before judgment because of the absence of binding precedent in other circuits -- particularly the Second Circuit -- that similarly establishes the authority of the President to require the transfer of Iranian assets held by domestic banking institutions in those circuits by the July 19, 1981, deadline provided in the Agreement with Iran. A decision by this Court prior to July 19 will furnish controlling precedent for the orderly disposition of the more than 400 cases pending in the lower federal courts in the Second Circuit and elsewhere that involve claims against the Government of Iran and its instrumentalities and controlled entities.

1.a. On December 19, 1979, petitioner filed suit in the United States District Court for the Central District of California against the Government of Iran, the Atomic Energy Organization of Iran, and a number of Iranian banks that, petitioner asserts (Pet. 5), had been nationalized by the Government of Iran. Dames & Moore v. Atomic Energy Organization of Iran, et al., No. 79-04918 LEW (Px) (C.D. Cal.). Petitioner alleged that it was a party to a written contract with the Atomic Energy Organization of Iran (AEOI), under which it was to conduct certain site studies for a proposed nuclear power plant in Iran. 1/ The contract was terminated by AEOI on June 30, 1979, for the convenience of AEOI, as provided in the contract. In its complaint against the Iranian defendants, petitioner alleged that

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1/ Actually, the complaint states that the party to the contract was a wholly owned subsidiary of petitioner, Dames & Moore International, S. R. L., and that this entity had assigned its entire interest under the contract to petitioner. For convenience, we will regard petitioner as the party to the contract.

it was owed $3,436,694.30 for services performed under the contract prior to the date of termination.

The contract with AEOI provided that if any dispute arising thereunder could not be resolved by agreement between the parties, the dispute would be submitted to conciliation 2 / and, if neither party was satisfied with the results of conciliation, "the matter shall be decided finally by resort to the courts of Iran" (Pet. 7 n.2). In its complaint in the action against the Iranian defendants, petitioner alleged that it had sought a meeting with AEOI for purposes of final settlement of all matters relating to the contract but that AEOI "has continually postponed said meeting and obviously does not intend that it take place" (Complaint, ¶27).

b. In its suit against the Iranian defendants, petitioner sought to recover the $3,436,694.30 that was allegedly owing, plus interest, on breach of contract and related theories. The district court issued orders of attachments directed against property of the defendants, and property of certain bank defendants was thereby attached to secure any judgment that might be entered against them. 3 / On January 27, 1981, petitioner moved for summary judgment against AEOI and the Government of Iran (but not the Iranian banks). The motion was accompanied by affidavits attesting to the amount owing under the contract and with a request pursuant to Fed. R. Civ. P. 37(b)(2) to prohibit AEOI

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2 / Each party had the right to appoint one conciliator, with a third conciliator to be appointed by the Plan and Budget Organization of the Government of Iran. Pet. 7 n.2.

3 / Although we have not seen documents itemizing the attached assets, we have been informed by counsel for petitioner that some of the assets on which attachments were obtained are held by domestic banking institutions and are therefore assets that must be transferred by July 19, 1981.

and the Government of Iran from introducing any evidence in opposition to petitioner's motion for summary judgment as a sanction for AEOI's failure to comply with petitioner's discovery requests.

On February 18, 1981, the district court granted petitioner's motion for summary judgment against AEOI and the Government of Iran for the amount claimed under the contract, plus interest. AEOI and the Government of Iran filed a notice of appeal from this judgment on March 20, 1981. Petitioner attempted to execute on this judgment by obtaining writs of garnishment and execution in state court in the State of Washington, and a sheriff's sale of Iranian property was noticed in Washington to satisfy the judgment (Pet. 5-6; Pet. App. 15-18). 4 / However, by order of May 28, 1981, as amended by order of June 8, the district court stayed execution of the judgment pending the appeal of that judgment by AEOI and the Government of Iran (Pet. App. 106-107). On May 28, 1981, the district court also ordered that all pre-judgment attachments obtained in the suit against the Iranian defendants be vacated and that further proceedings against the bank defendants be stayed (id. at 107).

2. On April 28, 1981, petitioner filed the instant suit for declaratory and injunctive relief against the United States and the Secretary of the Treasury, seeking to prevent enforcement of the Executive Orders and Treasury Department regulations implementing the Agreement with Iran in a way that would adversely affect its separate action against the Iranian defendants (Pet. App. 1-12). Those Executive Orders and

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4 / Petitioner did not obtain a pre-judgment attachment of assets of the Government of Iran or AEOI, the two defendants against whom judgments were entered.

regulations generally revoke licenses for attachments of Iranian property, prevent the acquisition of any interest in such property and order the transfer of the property as required by the Agreement and Executive Orders, and suspend claims that may be presented to the Iran-United States Claims Tribunal (Executive Orders 12277-12281, 12294 (Pet. App. 36-54); 31 C.F.R. 535.201 (1980); 31 C.F.R. 535.213 et seq., as amended (Pet. App. 55-86). Petitioner contended that these Executive Orders and regulations are unconstitutional to the extent that they affect its final judgment against the Government of Iran and AEOI, petitioner's execution on that judgment in the State of Washington, petitioner's pre-judgment attachments of assets of the Iranian bank defendants, and petitioner's ability to continue to litigate against the bank defendants, against whom judgment had not been entered (Pet. App. 7-11).

By order dated May 28, 1981, the district court denied petitioner's motion for a preliminary injunction and dismissed petitioner's complaint for failure to state a claim upon which relief could be granted (Pet. App. 106-107). By order dated June 8, 1981, the district court stated that its orders denying a preliminary injunction and dismissing the complaint were based on the arguments presented by the government in its motion to dismiss and its memorandum in support of that motion (Pet. App. 161). The government's motion to dismiss and the memorandum in support thereof, relied upon by the district court, are reproduced at Pet. App. 88-105.

On June 3, 1981, petitioner filed a notice of appeal from the order denying a preliminary injunction and dismissing the complaint (Pet. App. 163-164), and the appeal has been docketed in the court of appeals (id. at 162). On June 8, 1981, the

district court entered an injunction pending appeal preventing the federal government from requiring the transfer of Iranian property that is subject to any writ of attachment, garnish-ment, judgment, levy or lien issued by any court in favor of petitioner (Pet. App. 167-168). Petitioner now seeks certiorari before judgment to review the decision of the district court.

3. The decision of the district court in this case, which is based on the government's arguments in support of its motion to dismiss, is plainly correct. It is also consistent with the decisions of the First and District of Columbia Circuits, 5 / the only courts of appeals that have addressed the President's authority to revoke licenses for post-blocking order attachments of Iranian assets, to order the transfer of Iranian assets, and to provide for suspension of claims that may be referred to the Iran-United States Claims Tribunal. See Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Authority, No. 80-1027 (1st Cir. May 22, 1981); American Int'l Group, Inc. v. Islamic Republic of Iran, No. 80-1779 (D.C. Cir. May 22, 1981) (opinion filed June 5, 1981). 6 / Decisions of the district courts -- including two others in the Ninth Circuit -- also have unanimously sustained the authority of the President to revoke licenses for post-blocking order attachments and to order the transfer of property that had been subject to such attachments. See Security Pacific National Bank, et al. v. Government and State of Iran, No. CV 79-

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5 / None of the losing parties in the First or District of Columbia cases has thus far sought review in this Court or announced its intention to do so.

6 / Copies of these opinions are attached as appendices to this memorandum.

4661-RJK (C.D. Cal. April 30, 1981). 7 / Blount Brothers Corp. v. Government of Iran, Civ. Action No. C79-14424 (W.D. Wash. May 7, 1981); Unidyne Corp. v. Islamic Republic of Iran, No. 80-1029-A (E.D. Va. Mar. 30, 1981). 8 / And, finally, the Ninth Circuit has denied a stay pending appeal in the Blount Brothers case of an order vacating an attachment, thereby allowing that attachment to lapse. 9 /

Ordinarily, in view of these consistent and plainly correct rulings of the lower courts sustaining the President's authority, 10 / we would not acquiesce in certiorari (particularly certiorari before judgment) in a case raising these same issues. The government sought to sustain the President's authority in the lower courts, as has been done thus far, and

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7 / An appeal has been taken by the claimant in one of these four consolidated cases, and the government has moved to intervene in the court of appeals and for summary affirmance.

8 / Copies of these district court opinions were furnished to the Court by petitioner in Electronic Data Systems, Iran v. The Social Security Organization of Iran, No. 80-2035, cert. denied (June 8, 1981).

9 / The Ninth Circuit cited the "broad executive powers" conferred by the International Economic Emergency Powers Act, 50 U.S.C. (Supp. III) 1701 et seq. The district court order vacating the attachment in Blount Brothers became effective on June 6, 1981, when the claimant did not seek further review in this Court.

10 / In its opinion of June 7, 1981, the district court in Electronic Data Systems, Iran v. The Social Security Organization of Iran, et al., No. CA3-79-218-F (N.D. Tex.), concluded that the President does not have authority to suspend claims that may be referred to arbitration. The district court conceded that there was "ample precedent" for the Executive to settle such claims when United States courts recognized a broad doctrine of immunity of foreign sovereigns from suit (op. 13), but concluded essentially that this power had been implicitly divested by passage of the Foreign Sovereign Immunities Act (op. 13-14, 20-24). That conclusion is in error. See note 14, infra. Moreover, in EDS, the claim had been reduced to judgment before the United States entered into the Agreement with Iran, and the district court relied in part on the existence of that judgment (op. 24).

thereby, it was hoped, to eliminate the necessity for review by this Court except by way of denial of a petition for certiorari or denial of applications for stays of orders vacating attachments. However, at the present time, there has still been no decision on these questions by the Court of Appeals for the Second Circuit. The absence of controlling precedent in that circuit is particularly significant, because there are more than 150 cases involving claims against Iran pending in the Southern District of New York, and the largest portion of the financial assets held by domestic banking institutions that must be transferred by July 19 are in that circuit. On June 5, 1981, following promulgation of the latest Treasury regulations, the Department of Justice has requested all district courts -- including the Southern District of New York -- where Iranian asset cases are pending that these courts vacate orders of attachment prior to June 19, 1981. That date is the date on which the Department of the Treasury indicated that it would seek civil and criminal sanctions against banks that did not transfer financial assets to the Federal Reserve Bank of New York as required by the regulations.11 / Similarly, on June 9, 1981, the government filed a motion in the Court of Appeals for the Second Circuit requesting that court to vacate attachments in the 96 consolidated cases pending there without waiting for further proceedings by the district court on remand. See New England Merchants National Bank v. Iran Power Generation & Transmission Co., Nos. 790, 1049-1144, 1145-1224, 1225-1227 (2d Cir. April 9,

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11 / See the government's Supplemental Memorandum, filed June 5, 1981, in Electronic Data Systems, Iran v. The Social Security Organization of Iran, supra.

1981), slip op. 2436 (retaining jurisdiction of these cases pending remand for further proceedings).12 /

Principles of sound judicial administration also weigh strongly in favor of certiorari before judgment here. There are more than 400 cases involving claims against Iran pending in district courts around the country. Review by this Court, which alone can furnish precedent that will control in all district courts, will allow for the orderly disposition of these cases and remove any remaining uncertainty about the validity of Executive orders and regulations implementing the Agreement with Iran.

For these reasons, the instant case plainly is one of "imperative public importance" requiring "immediate settlement in this Court" by means of certiorari before judgment. S. Ct. Rule 18. If the Court grants certiorari in this case, the Department of the Treasury will not seek to impose criminal and civil sanctions on persons who do not transfer assets to the Federal

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12 / Despite these most recent efforts to obtain a prompt decision from the courts in the Southern District of New York and the Second Circuit, we cannot be confident that those courts will reach a decision within the time required for the timely transfer of bank-held assets to the Federal Reserve Bank for subsequent transfer pursuant to the Agreement with Iran. Moreover, although we believe that the decisions of the First and District of Columbia Circuits are compelling precedent, if the Second Circuit or Southern District should nevertheless conclude that the President was without authority in some respects to enter into and implement the Agreement with Iran, the government would intend to seek immediate review in this Court in order that bank-held assets would be transferred by July 19. Because the Southern District and the Second Circuit have not yet ruled, there would be even less time for this Court to consider a petition for certiorari in those circumstances than there is here. We note as well that there has been no controlling ruling on the merits of these questions in the Ninth Circuit, although decisions of three district courts in that circuit have sustained the President's authority and the Ninth Circuit has denied a stay pending appeal in one of the cases. We therefore believe that the most prudent course involves immediate review by this Court in the instant case, which presents the same issues.

Reserve Bank by the June 19 deadline set forth in the June 4 revisions of the Treasury regulations (Pet. App. 152).

4. If the Court concludes that the petition for a writ of certiorari before judgment should be granted, the Court may wish to consider summary affirmance of the district court's order on the basis of the thorough opinions of the Courts of Appeals for the First and District of Columbia Circuits in Chas. T. Main International, Inc. v. Khuzestan Water & Power Authority, et al., and American International Group v. Islamic Republic of Iran, supra. For the Court's convenience, we are appending copies of those opinions to this Memorandum. We are also appending a copy of the government's brief in the latter case, which fully sets out the arguments in favor of the Presidential action challenged here.13 / Although the questions presented are indisputably of major public importance because of the number of claimants and cases affected, and plainly require immediate resolution, we believe that these questions are not particularly difficult and that the attached materials furnish a fully adequate basis on which to decide them. See S. Ct. Rule 23.1.

Petitioner obtained attachments of assets of the Iranian bank defendants after November 14, 1979, when President Carter issued Executive Order 12170 (44 Fed. Reg. 65729) freezing Iranian assets in this country. After issuance of that Executive Order, pre-judgment attachments of Iranian assets could only be obtained by means of a license obtained from the Treasury. 31 C.F.R. 535.201, 535.203, 535.310 (1980). The Department of the Treasury issued a blanket license for judicial proceedings with

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13 / See also the government is memorandum in support of its motion to dismiss the complaint in the district court (Pet. App. 90-105).

respect to Iranian property, including pre-judgment attachments (31 C.F.R. 535.418, 535.504(a) (1980)), but entry of a final judgment was expressly barred by the regulations (31 C.F.R. 535.504(b)(1) (1980)). However, such orders and licenses were explicitly made revocable at any time (31 C.F.R. 535.805 (1980). Thus, petitioner was on notice when it obtained its pre-judgment attachments that the license for such attachments could be revoked at any time. See also Orvis v. Brownell, 345 U.S. 183, 187 (1953). Thus, no unfairness to petitioner resulted when the President revoked these licenses and the district court ordered the attachments vacated. As explained in the opinions of the First and District of Columbia Circuits, the President's actions revoking the license for attachments and rendering those attachments of no legal effect were plainly authorized by the International Emergency Economic Powers Act (IEEPA). No lower court decision has taken a contrary position.

The First and District of Columbia Circuit opinions also amply sustain the power of the President to settle claims against Iran by providing for arbitration of those claims, particularly in the context of the grave international crisis resulting from the seizure of American hostages. See also 22 U.S.C. 1732.14 / Under Executive Order 12294 (Pet. App. 52), petitioner's claim against Iran is only suspended pending its presentation to the Claims Tribunal; its claim need not be dismissed outright. If that Tribunal determines that it does not have jurisdiction of

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14 / Petitioner's contention that the Foreign Sovereign Immunities Act implicitly divested the President of his authority to settle claims is in error for the reasons given by the First Circuit in its Charles T. Main opinion, at 20-21. That Act dealt with the question of immunity to suit, not whether the plaintiff in a suit against a foreign sovereign has stated a claim on which relief could be granted.

petitioner's claim, the claim may be reactivated in district court (Executive Order 12294, Section 3). If the Tribunal determines that petitioner should recover on its claim, that determination operates as a discharge of Iran's obligation only upon full payment of the award (ibid., Section 4). Thus, petitioner's claim in district court would be preserved if the award were not paid.

Hence, the President has provided a reasonable and fully adequate means for resolving claims against Iran and, consistent with the purposes of IEEPA, has assured the presence of funds to pay arbitration awards out of the Iranian assets that were frozen on November 14, 1979.

It is therefore respectfully submitted that the petition for a writ of certiorari before judgment should be granted, and the judgment of the district court should be affirmed.

WADE H. McCREE, JR.
Solicitor General

JUNE 1981